Supreme Court, U. S.
FILED
AUG 4 1980
MICHAEL RODAK, JR., CLERK

NO. 80-112

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ALLAN R. McKNIGHT

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ALLAN R. McKNIGHT	)	
	)	
Petitioner,	)	On Petition for
	)	Writ of Certiorari
v.	)	to the Supreme Court
	)	of the
THE PEOPLE OF THE	)	State of Colorado
STATE OF COLORADO,	)	
	)	
Respondent.	)	

BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

The respondent accepts the petitioner's statement as to jurisdiction and the petitioner's list of the consitutional provisions involved. However, the factual context of this case requires a restatement of the issue presented.

QUESTION PRESENTED

Does the discretionary decision of a trial court to sentence a felon to the minimum term of incarceration, rather than to grant probation, violate the Eight Amendment proscription of cruel and unusual punishment?

STATEMENT OF THE CASE

Allan McKnight, formerly a county commissioner for Adams County, Colorado, was convicted of five counts of

embezzlement of public property. Before the court imposed sentence, a presentence report noted the petitioner had high blood pressure, chronic diarrhea, and hypoglycemia. The report also indicated McKnight had been discharged from the army on the basis of emotional instability, and that he continued to have emotional problems.

At the sentencing hearing Dr. David Rice, the petitioner's psychiatrist, testified that it was hard to predict the effect a penitentiary sentence would have on the man. He indicated McKnight had cut his wrists when he was fifteen and had "seriously threatened" suicide several different times. He concluded that incarceration would be "a grave health risk," as the petitioner would see suicide as "a way out" of prison, but said he did not really believe incarceration would be life threatening.

The court sentenced McKnight to an indeterminate term not to exceed three and one-half years, the minimum sentence of incarceration for a class 4 felony under the statutes in effect at the time. Colo. Rev. Stat. 1973, section 16-11-101(1)(b) (1978 repl. vol.); Colo. Rev. Stat. 1973, section 18-1-105(1) (1978 repl. vol.). The trial judge stated he thought adequate provision could be made for the petitioner's health. The court further ordered that physical and mental examinations should be given if the petitioner's conviction were affirmed on appeal.

After the affirmance of the petitioner's conviction by the Colorado Court of Appeals, he moved for a reconsideration of his sentence in the trial court. At the Colo. R. Crim. P. 35(a) hearing, the court received into evidence a letter from Dr. Rice, a psychiatric evaluation from the court appointed forensic psychiatrist, Dr. Edmund Casper, and testimony from Dr. John Thomas Norton, a cardiologist.

Rice indicated the petitioner's condition had deteriorated. He said McKnight was "absolutely unpredictable" and that suicide was "imminently possible." Casper indicated that there was no way to predict the effect incarcera-

tion would have on McKnight, but stated McKnight would be a "high risk" inmate, "as he has been a high-risk psychiatric patient throughout his life from the age of thirteen or fourteen." Casper also indicated that a definite decision as to whether the petitioner would be going to prison would "no doubt" relieve some of his anxiety. Norton predicted the petitioner's suicidal tendencies would cause his death. However, his prognosis was based on the assumption that the petitioner would go to Pueblo — the Colorado State Hospital.

The trial court refused to reconsider or reduce the petitioner's sentence. Its decision was appealed to the Colorado Court of Appeals and to the Colorado Supreme Court. The Colorado Supreme Court held that the propriety of the petitioner's sentence was not appealable and remanded the case to the court of appeals with orders to dismiss the appeal.

ARGUMENT

THE TRIAL COURT'S DISCRETIONARY DECISION TO SENTENCE THE PETITIONER TO THE MINIMUM TERM OF INCARCERATION DID NOT CONSTITUTE AN INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT.

No challenge to the petitioner's sentence was raised in his substantive appeal to the Colorado Court of Appeals. The posture in which this case reached the Colorado appellate courts was as an appeal from the trial court's refusal to reconsider the sentence under a Colo. R. Crim. P. 35(a) motion. At the time this case arose the purpose of a Colo. R. Crim. P. 35(a) proceeding was to allow the trial judge to reduce an excessive sentence or to correct an illegal sentence. The proceeding was never intended to be a forum for raising claims of constitutional violations. *See People v. Guitron*, 191 Colo. 284, 552 P.2d 304 (1976). The petitioner's allegation of cruel and unusual punishment should have been raised in a Colo. R. Crim. P. 35(b) motion.

Assuming for argument that the issue of cruel and unusual punishment is properly before this court, the petitioner's allegation finds no support. A well-considered sentence to the minimum term of incarceration did not violate the Eighth Amendment rights of the petitioner.

The issue presented to and rejected by the Colorado appellate courts was whether the trial court had abused its discretion in sentencing an undeniably ill man to the minimum term of imprisonment. This court has held that appellate review of sentence is at an end once it is determined that the sentence is within the limits set forth in the statute. *Dorzynski v. United States*, 418 U.S. 424 (1974). Furthermore, a sentencing judge is afforded wide discretion in determining the appropriateness of the punishment imposed. *Williams v. Illinois*, 399 U.S. 235, 243 (1970).

As the petitioner here was sentenced to the minimum period of incarceration, his attack on his sentence constitutes an attack on the court's refusal to grant probation. The Colorado Supreme Court has determined that probation is a privilege, not a right, *Holdren v. People*, 168 Colo. 474, 452 P.2d 28 (1969), and the Fifth Circuit Court of Appeals has held the imposition of a sentence to incarceration, rather than probation, does not constitute cruel and unusual punishment. *United States v. Frick*, 490 F.2d 666 (5th Cir. 1973) *cert. denied sub nom. Peterson v. United States*, 419 U.S. 831 (1974).

Although a claim of cruel and unusual punishment constitutes an attack on the substance of one's punishment, the petitioner's position that probation should have been granted merely attacks the form of his punishment. When the form of punishment is assailed, a two-step inquiry must be conducted under *Gregg v. Georgia*, 428 U.S. 153 (1976), as explained in *Coker v. Georgia*, 433 U.S. 584 (1977). The punishment offends the Constitution if it involves purposeless and needless imposition of pain and suffering or if it is grossly out of proportion to the severity of the crime.

While currently evolving standards of decency could not condone the imposition of the death sentence for embezzlement, *see e.g., Coker v. Georgia,* 433 U.S. 584, 598-599 (1977), the petitioner was not given the equivalent of a death sentence. Both psychiatrists indicated McKnight's reaction to incarceration was unpredictable, and that he had been suicidal since he was quite young and would continue to be potentially suicidal in prison. Dr. Norton indicated the petitioner would kill himself if he were sentenced to the state hospital. None of the predictions of death was based on conditions at the Colorado State Reformatory or the Colorado State Penitentiary.

The trial court stated it thought adequate provision could be made for the petitioner's condition. There was no evidence presented that the petitioner would not receive physical and mental health care. His reliance on *Estelle v. Gamble,* 429 U.S. 97 (1976), in support of his claim is misplaced. Even if this court were to extend the rationale of *Estelle* beyond the prison context and into an examination of a sentencing judge's conduct, McKnight could not fit himself within the guidelines established in *Estelle.*

It is only "deliberate indifference" by the state to "serious medical needs" of a person under its control which offends the eighth amendment. No deliberate indifference by the trial court has been revealed. In fact, a great deal of evidence as to the petitioner's health condition was taken and considered by the trial court before the imposition of sentence and before the court refused to reconsider sentence. The record of the proceedings was before both the Colorado Court of Appeals and the Colorado Supreme Court.

The refusal to grant probation after a thorough review of the defendant's history and medical needs has been determined not to constitute cruel and unusual punishment. *See United States v. Gamboa,* 543 F.2d 545 (5th Cir. 1976); *cf. United States v. Hayes,* 589 F.2d 811 (5th Cir.) *cert denied,* ____ U.S. ____ , 100 S.Ct. 93 (1979). (No Eighth Amendment violation when sentencing judge considered presentence reports, special medical reports, and defendant's background).

Any implication that prison officials will not care for the needs of the petitioner are premature. No deliberate indifference to the petitioner's serious medical needs can be shown until prison officials have had a chance to act on those needs.

The sentence imposed here fails to "shock the conscience" or to offend "evolving standards of decency." Although the petitioner has demonstrated he has medical needs, there has been no indication of "deliberate indifference" on the part of the State to those needs. In fact, the only indication of an indifference to the petitioner's welfare is the indication that he himself may take his life whether he is in or out of prison.

CONCLUSION

As there is no indication the petitioner has been cruelly and unusually punished, it is urged that certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within BRIEF IN OPPOSITION upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this ____ day of July 1980, addressed as follows:

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